CHILD LABOR TAX CASE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 590.

J. W. BAILEY, COLLECTOR OF INTERNAL REVENUE, ET AL., APPELLANTS,

vs.

JOHN J. GEORGE, TRADING AND DOING BUSINESS AS VIVIAN COTTON MILLS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLEES.

CAMPBELL B. FETNER,
W. CLEVELAND DAVIS,
Counsel for Appellees.

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Statement of Case.

This is an appeal by the defendants in the court below from a judgment of the District Court for the Western District of North Carolina, rendered the 22d day of August, 1921, making permanent an injunction issued in the cause.

restraining the Collector of Internal Revenue and his deputies from levying upon and selling the property of the appellees, and holding unconstitutional and void such part of the Federal Revenue Act of February, 1919, as imposes, or seeks to impose, a 10 per cent tax, additional to all other taxes, on the profits arising from the sale or disposition of the products of mines, quarries, mills, canneries, workshops, factories or manufacturing establishments which at any time during the year shall have employed or permitted to work children under the age of fourteen years at all, children between the ages of fourteen and sixteen years for more than eight hours in any day for more than six days in any week, or after the hour of 7 o'clock p. m. or before the hour of 6 o'clock a. m.

This suit was instituted on July 7, 1921, to enjoin the collection of a tax assessed under the law in question, the contention being that the statute is unconstitutional.

The bill, as amended, alleges that the plaintiff John George during the year 1919 manufactured cotton yarns at Cherryville, N. C., under the name of "Vivian Cotton Mills." The property and business had passed to the other plaintiff, the Vivian Spinning Company, before the institution of this suit.

The defendants are the Collector and the Deputy Collector of Internal Revenue for North Carolina.

On November 9, 1920, the Commissioner of Internal Revenue, acting under the provisions of the Child Labor Tax Law, assessed against the plaintiff George and his property, the Vivian Spinning Company, the sum of $2,098.06, due November 19, 1920, with a penalty of 5 per cent per month from the date due until paid, the Commissioner claiming

that during the taxable year 1919 there had been employed in the Vivian Cotton Mills children under the age of fourteen and children between fourteen and sixteen years of age more than eight hours a day, after 7 p. m. and before 6 a. m., contrary to the statute.

The plaintiffs deny violation of the act and aver that the Commissioner advised them to file a claim for abatement of the tax, which claim was duly filed and disallowed, and the Collector was instructed to collect the tax by distraint proceedings. They further allege that, unless restrained, the Collector will sell plaintiffs' property, subjecting plaintiffs to a loss of approximately $50,000, in view of the low state of the market for cotton mills, cotton-mill stocks, and cotton-mill products, and to other great and irreparable damage.

The bill prays that the assessment be declared void and that defendants be enjoined from selling plaintiffs' property, it being alleged in the bill, as amended, that the statute is unconstitutional (1) as depriving plaintiffs of their property without due process of law, in violation of the Fifth Amendment; (2) as denying to them the right to trial by jury, which is guaranteed to them by the Seventh Amendment; (3) as providing for the exercise of a power not delegated to the United States, but reserved to the States and to the people under the Tenth Amendment, and (4) as not constituting a tax measure but an attempted regulation of hours of labor and age of employees, under which a penalty is imposed and enforcement is proposed without giving the petitioners an opportunity to be heard, although they deny liability.

The plaintiffs contend that this assessment against the plaintiffs and subsequent attempted levy was brought about

because of the fact that a deputy collector of internal revenue incorrectly instructed the plaintiffs as to how to make a report to the Commissioner of Internal Revenue (while in fact plaintiffs were not liable to the tax (Record, p. 15).

A temporary restraining order was issued as prayed. Thereafter defendants filed an answer to the bill, denying certain allegations of the bill, but not denying section 9 of the bill, to wit, that should the Commissioner of Internal Revenue be allowed to sell petitioners' property for the purpose of collecting this assessment it would occasion petitioners a loss of approximately $50,000 and a great and irreparable damage and loss would be otherwise inflicted on the petitioners (Record, p. 25).

The defendants also moved to dismiss the case for want of jurisdiction, on the ground that the court was forbidden by Revised Statutes, section 3224, to entertain a suit to restrain the collection of a tax.

The district judge denied the motion to dismiss and made permanent the temporary restraining order. The court held that the Child Labor Tax Law was unconstitutional, as constituting an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of the States.

It further held that a suit to prevent the collection of this tax, which was held unconstitutional, might be maintained, since to permit its collection would be to extend the power of Congress, through taxation, to legislation forbidden by the Constitution, especially the Ninth and Tenth amendments. It also ruled that the statute provided not for a tax but for a penalty to prevent violation of its provisions, which penalty could not be enforced by assessment and distraint, and that therefore a permanent injunction should be granted.

The defendants were allowed a direct appeal to this court.

Statement of Questions Involved.

There are two questions involved in this case.

First Question.

Whether section 1200 of the Revenue Act of 1918, approved February 24, 1919, 40 statutes, chapter 18, page 1138, and known as the Child Labor Tax Law, as hereinbefore set out, is within the constitutional authority of Congress to enact. The case of J. W. Bailey and J. W. Bailey, Collector of Internal Revenue for the District of North Carolina, against Drexel Furniture Company, No. 657, is in this court and by consent and order of court set down for hearing at the same time this case is heard, and involves the constitutionality of the Child Labor Tax Law. The Government has filed a single brief dealing with the questions involved in these two cases. On the question of constitutionality of the Child Labor Tax Law we, with their permission, adopt the brief of the Drexel Furniture Company, defendant in error, and the argument in said brief as the brief and argument of the appellees in this case.

Second Question.

The question of jurisdiction.

The appellants contend that the courts are inhibited from enjoining the assessment and collection of this tax under a warrant of distraint by section 3224 of the Revised Statutes, which provides:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The case of Bailey against Drexel Furniture Company is to be heard with this case, and that case presents the single question of the constitutionality of the Child Labor Tax Law. Therefore the question of jurisdiction in this case becomes purely academic, for the reason that should the court in the Drexel Furniture case find that the Child Labor Tax Law is constitutional the appellees in this case would have to pay the tax. On the other hand if this court should determine that said law is unconstitutional it certainly would not be the policy of the Government to insist that the appellees pay a tax under an unconstitutional law.

However, since the Government has raised the question of jurisdiction, the contentions of the appellees with reference thereto are that the inhibition of section 3224, Revised Statutes, is not applicable in this case because—

(*a*) The tax imposed by the Child Labor Tax Law is not in fact a tax but is a punitive penalty.

(*b*) Even though the court should find that the Child Labor Law imposes a tax this being a case of irreparable injury, the court has jurisdiction.

(*c*) The Child Labor Tax being not for the purpose of raising revenue, but for the purpose of regulating child labor, and no revenue being contemplated by the act, the reason for the application of section 3224, Revised Statutes, fails.

ARGUMENT.

Section 3224, Revised Statutes, is not Applicable to This Case Because the Tax Imposed by the Child Labor Tax Law is not in Fact a Tax, but is a Punitive Penalty.

The plaintiffs in this cause ask for injunctive relief on the specific grounds that the Child Labor Act imposes a penalty or fine.

The amended bill of complaints, paragraph eleven, subsection (*d*) (case on appeal, page 14), alleges:

> "In that, as will appear from the very terms and provisions of the Act itself, it is in no sense a tax measure, intended to raise revenue, but is in fact an attempted regulation of the hours of labor permitted in factories and mines within the several States and the alleged assessment above referred to is in no sense a tax but is in fact equivalent to a fine or penalty imposed upon any manufacturer failing to comply with the attempted regulation of hours of labor and age of employees, and that the said fine or penalty has been imposed on the petitioner, although he is not in fact liable for said fine or penalty and although he has been given no opportunity to be heard."

The great underlying purpose in the enactment of section 3224, Revised Statutes, is that the Government shall not be delayed in the collection of its revenue. This is clear from the decisions wherein the statute has been applied. As interpreted by these decisions, the statute relates to exactions

properly called taxes—that is, exactions for the purpose of raising revenue with which to run the Government.

Barnes *vs.* Railroad, 17 Wall., 307.
Dodge *vs.* Osborne, 240 U. S., 118.
Dodge *vs.* Brady, 240 U. S., 122.

The Child Labor Law does not levy a tax within the meaning of that term. Its purpose is not to raise revenue with which to run the Government. Looking only at the statute itself one must conclude that it is more in its direct and necessary result—in its natural and reasonable effect—a regulation of the hours of labor permitted in factories and mines. It is not a tax at all, but is an attempt by Congress to exert a power as to a purely local matter, to which the Federal authority does not extend.

A careful consideration of the provisions in detail of the statute verifies the first impression that it is not a taxing measure at all, but a simple Congressional regulation of hours of labor and of the age of wage earners, a subject now regulated by the State of North Carolina by a criminal statute (Public Laws N. C., 1919, ch. 100).

The violation of the State act is made a criminal offense and is punishable by fine or imprisonment or both, in the discretion of the court.

A tax is defined as "an enforced contribution for the payment of public expenses." That in Houck *vs.* Little River Drainage District, 239 U. S., 254, and again in N. J. *vs.* Anderson, 203 U. S., 483, 492, the court defines a tax as follows:

> "Generally speaking a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government."

Ordinarily a tax is understood to be a charge enforced by legislative power upon person, property, or privilege to raise money for public purposes.

In the light of this definition, let us test the "so-called tax" in question, and in doing so let us remember that names are not controlling.

Clearly the "tax in question" is not levied upon person nor upon property. Is it, then, a privilege tax? Would a reasonable mind, upon reading the statute, conclude that Congress meant to collect the tax upon the theory that it was extending to the manufacturer the privilege of employing children under the prohibited age?

It is significant that when the tax is paid no license is granted.

In McBride *vs.* Adams, 70 Miss., 746; 12 Southern, 699, the court said:

> "We have held and must always hold that the State may not by mere legislative declaration create a right and execute it by its executive officer, and we must decide that so much of sec. 1590 of the Code of 1892, as authorizes the sheriff and revenue agent to assess and collect by distress the penalty thereby imposed is violative of art. 3, sec. 14, of the Constitution. The penalty prescribed is not a tax and cannot be made one by the mere authority to assess it as such."

There are a number of cases arising under the Volstead Act which we submit fully support the present action. In the cases referred to, a collector of internal revenue was seeking by distress proceedings to collect the penalty or tax imposed by the Volstead Act and was enjoined.

Thorne *vs.* Lynch, 269 Federal, 995.

Accardo *vs.* Fontenst, 269 Fed., 447.

Kaush *vs.* Moore, 268 Fed., 668

In each of these cases the contention that sec. 3224, Revised Statutes, applied was unsuccessfully advanced, the court holding that the proper method of collection of the penalty was by suit in the District Court, as provided by law.

That no revenue was intended to be raised by the Child Labor Act, but that it was intended to exert a power as to a purely local matter, to which the Federal authority did not extend and to penalize or fine the manufacturer for his failure to comply with the will of Congress is shown by the discussion in the Senate of this matter.

Senator Lodge, favoring the provision, says:

> "The amount of revenue to be raised by this measure may be little or nothing. The main purpose is to put a stop to what seems to be a very great evil and ought to be in some way put a stop to." (*Congressional Record*, vol. 57, p. 619.)

Senator Simmons said:

> "I do not know what the members of the committee expected, but I have heard no one suggest any revenue would be raised by it. My individual judgment is no revenue will be raised by it." (*Ibid.*, p. 620, *Congressional Record*.)

Senator Kenyon said:

> "Now that the Supreme Court in the original child labor case has decided that the law is unconstitutional, it seems to be perfectly proper and perfectly right that we should try to find some means of nullifying that action of the Supreme Court, and that is what we are trying to do. Here the Supreme Court decided that an attempt through the interstate commerce clause to regulate this wrong was an unconstitutional way to

get at it. Now we will try another way, and pass that on to the Supreme Court for them to state whether or not it is constitutional legislation." (*Ibid.*, p. 626.)

Hammer *vs.* Dagenhardt, 247 U. S., 251, which case declared unconstitutional the Child Labor Law of 1916, which act prohibited the shipment in interstate or foreign commerce of any product of a mill situated in the United States in which, at any time during the period of thirty days before the removal of the product, children of certain ages had been employed in the manufacturing establishment; the act was declared unconstitutional as exceeding the power of Congress and as invading the power reserved to the State. The court decided that when the purpose of an act of Congress is to exert a power as to a purely local matter to which the Federal authority does not extend, to wit, to regulate the hours of labor of children in factories and mines within the States, the act will be declared void as exceeding the authority granted by the Constitution and as invading the power reserved to the State

The Dagenhardt case is also authority for this proposition, that when the purpose and effect of an act necessarily appears from a consideration of the act itself and the sources open to the court to consider, the court will go behind the form to the substance of the act.

The propositions laid down in the Dagenhardt case should apply equally to all grants of power under the Constitution, including the power to tax, unless, forsooth, there are no constitutional barriers against the powers of taxation, and Congress may be allowed under the guise of taxation to exert any influence upon matters purely local, at the congressional

will, and those affected are to be deprived of their ordinary remedies and rights in courts of justice.

This (Child Labor) statute, being a criminal or penalizing statute over matters of which Congress has no control, it is condemned by the principles announced by this court in cases in which taxing statutes have been upheld.

> "* * * When it was plain to the judicial mind that the power had been called into play * * * not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, then it would be the duty of the court to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred" (McCray case, 195 U. S., 27, 64).

Is the act for the purpose of raising revenue? The discussion in the Senate of this section of the act, page 9, *supra*, shows that there was no revenue contemplated by this section.

There was in fact no revenue raised by the law. From April 20, 1919, to June 30, 1921, the Internal Revenue Department, with an average staff of fifty employees, collected the gross sum of $26,603.87. If it be assumed that the employees received average annual salaries of $2,000, this has been at an expense of over $200,000. In other words, they have collected approximately one-tenth of the amount necessary to pay the expenses of collecting the "tax."

There was no revenue contemplated and no revenue raised. Is it not "plain to the judicial mind that the power (*power to tax*) had been called into play * * * not for

revenue?" Is it not "plain to the judicial mind" that the act is "solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the constitution rests."

In the words of Boyd, D. J., in the case below (274 Fed., 639):

> "By the Constitution the Federal Government is invested with power by Congressional Legislation, 'To levy and collect taxes, duties, imposts, and excises, to pay the debt and provide for the common defense and general welfare of the U. S..' But nowhere in the Constitution can be found authority to the National Government to regulate labor within the States."

The 10th Amendment to the Constitution reads:

> "The powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The rights of the States and of the people are fortified by the Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

What rights were retained by the people? The rights to regulate their own local conditions, their own internal affairs, chiefly among which is the hours of labor and labor conditions within the State. Then, in the language of the court (McCray case, *supra*), "Such an arbitrary act (*is*) not

merely an abuse of a delegated power, but (*is an*) exercise of an authority not conferred." (Italics ours.)

If in "an exercise of an authority not conferred" Congress sees fit to penalize or fine a manufacturer for a violation of the Congressional will, and to place such an act in a revenue statute, then, forsooth, is the manufacturer to be denied the remedies which should be open to him ordinarily because Congress saw fit to place such act in a revenue statute? We respectfully submit that such cannot be the law of the land.

If this is a tax, it must be a privilege tax, and yet it neither bears any proportion to the extent to which the privilege is enjoyed, nor does the payment of the tax give to the manufacturer the privilege. The brief of the Government in the Dagenhardt case avers "that the employment of child labor was morally repugnant and socially unwise." This "morally repugnant" conduct is now converted into a privilege, and to enjoy this "morally repugnant" privilege the manufacturer pays 10 per cent on his net profits. The object and purpose of the act is to operate as a deterrent, just as any other criminal act which is "morally repugnant," but the sad, sad story in connection with this criminal statute, "A bill to raise revenue," is that the accused is given no trial, civil or criminal, and is tried, sentenced, and financially executed by one and the same person, to wit, the Commissioner of Internal Revenue, and if the Government's contention is true, that section 3224, R. S., applies, then all of this is done without any recourse to the courts of justice until the financial execution is completed.

It is significant that under section 1203 of this act, if the manufacturer in good faith employs a child under a mistake of fact as to the age of such child, the tax shall not be im-

posed. In other words, the lack of scienter is a defense to the tax, just as it is a defense to nearly every penalty for crime.

It will be noted that in paragraph six of the bill (Record, page 2) the petitioner alleges that he had not employed children of such age or at such hours as to render the statute applicable, and in paragraph eight (Record, page 3) that he has been given no trial, either civil or criminal.

Under the provisions of section 3213 of Revised Statutes, the Government could institute a suit for the collection of any amount due by the plaintiff under the statute in question. Surely such a course would be more in harmony with fundamental principles than the very drastic one adopted in this case.

It will be noted that the act itself does not expressly provide for a collection of tax by a warrant of distraint. In the absence of such provision the usual method of collecting a penalty is by suit or other appropriate proceedings in court.

22 Cyc., 1680; 30 Cyc., 645.

Less *vs.* The U. S., 150 U. S., 479.

Even Though the Court Should Find That the Child Labor Law Imposes a Tax, This Being a Case of Irreparable Injury, the Court Has Jurisdiction.

Notwithstanding the inhibition of section 3224, Revised Statutes, the courts hold that the collection of the tax should be restrained if the enforcement of the tax would produce irreparable injury, or under other circumstances justifying equitable relief.

In Allen *vs.* B. & O. Railroad Co., 114 U. S., 311, and other Virginia coupon cases, where Allen was Auditor of

Public Accounts of Virginia, and Hamilton Treasurer of Augusta County in that State. The Auditor had assessed certain railroads upon their real estate, not having any rolling stock, as being in default for non-payment of taxes assessed by the Board of Public Works, and had placed a copy of the assessment in the hands of the defendant Hamilton, as Treasurer of Augusta County, for collection, in pursuance of which he had levied on certain cars and locomotives belonging to the complainant and threatened to make further levy upon other cars and engines and sell them for payment of said taxes, and the bill prayed for an injunction upon the several grounds of irreparable damage, avoidance of multiplicity of suits, and removal of cloud upon title. The court, held that this made a case of irreparable injury, and that injunction would lie.

In Cummings *vs.* Merchants National Bank, 101 U. S. 153, jurisdiction of restraining order was maintained upon the ground of preventing multiplicity of suits.

In Poindexter *vs.* Greenhow, 114 U. S., 270, an action of detinue brought by Poindexter, a taxpayer, against Greenhow, Treasurer of Richmond, Virginia, for a desk belonging to plaintiff seized for the purpose of raising the tax claimed to be due from plaintiff after he had tendered coupons in payment thereof in pursuance of the Virginia Act of 1871, making the coupons receivable for taxes. In 1882, Virginia passed an act providing that, in case of proceeding instituted against a taxpayer for the collection of his tax notwithstanding his tender of coupons in payment thereof, he should pay the taxes under protest in lawful money, and then sue the officer for the amount, and provided further that no writ of injunction should be issued to hinder or delay the collection

of the tax. In this case the court held that the acts of 1882 were unconstitutional so far as they deprived the taxpayer of his remedy by detinue after tendering receivable coupons in payment of the taxes.

Even in the cases in which equitable relief was not granted in efforts to enjoin the assessment or collection of taxes the Supreme Court of the United States has, without exception, recognized the doctrine that in cases of irreparable injury the assessment or collection of the tax should be enjoined.

In the State Railroad Tax cases, 92 U. S., 575, a case frequently cited in later cases as an authority in support of the position that an injunction should not lie for restraining assessment or collection of taxes, on page 614, says:

> "In this latter case (Dow *vs.* Chicago, 11 Wall., 108) this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says: 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary process of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.'"

So in the case of Hannewinkle *vs.* Georgetown the court says:

> "It has been the settled law of this country for a great many years, that an injunction bill to restrain

> the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it throws a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause of presenting a case of equity jurisdiction."
>
> 15 Wall., 548.

And the court, in the State Railroad cases, continued:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction."

In Shelton *vs.* Platt, 139 U. S., 273, which was an injunction to restrain the collection of certain license taxes imposed upon the U. S. Express Company in Tennessee, the defendants filed a plea in abatement, setting up an act to facilitate the collection of revenue approved by the Legislature of Tennessee March 21 1873, and insisted that in accordance with its terms complainant's only remedy was to pay under protest the taxes complained of, and then sue within thirty days thereafter for a recovery of the amount so paid; and no injunction or other restraining order or writ to prevent the collection of said taxes would lie. Section 2 of said act provides:

> "No writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue, with injunction, supersedeas, prohibition or any other writ or process whatever."

Mr. Chief Justice Fuller delivered the opinion of the court and, on page 275, said:

> "A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant."

And again, on page 276, the court, in Shelton *vs.* Platt, citing from Cooley on Taxes, page 536, says:

> "Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases may be afforded in the courts of equity."

In the case of Shelton *vs.* Platt the court denied the right of injunction because of the failure to allege irreparable injury. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on would subject it to damage and inconvenience which would be in their nature irremediable. The bill showed the Company to be doing a vast business.

In paragraph 9 of the petition in this cause (Record, page 3) these complainants allege:

> "That the market for cotton mills and cotton mill stock and cotton mill products is unusually low, and that there is practically no market for the same now, and should the said Commissioner of Internal Revenue be allowed to sell your petitioners' property for the purpose of collecting this illegal assessment that it would occasion your petitioners a great loss of approximately $50,000 and a great and irreparable damage and loss would be otherwise imposed upon your petitioners."

The defendants in their answer do not deny the allegation in paragraph nine of the petition.

Again, in section 7 of the petition, the plaintiffs allege (Record, page 3) that said deputy or deputies will levy on and sell the real and personal property of your petitioners thereunder for the collection of said wrongful assessment, unless said Commissioner of Internal Revenue and said deputies are restrained by order of this honorable court.

In section 7 of the answer (Record, page 25) the defendants admit the allegations contained in paragraph 7 of the bill.

It not being denied that the market for cotton mills and cotton-mill stock and cotton-mill products was unusually low; that there was practically no market for the same at the time of the institution of this suit, and that if the Commissioner of Internal Revenue, should he be allowed to sell petitioners' property, would occasion petitioners a great loss, of approximately $50,000, and would inflict other great and irreparable damage and loss upon the petitioners, and it being further admitted that the Collector of Internal Revenue or his deputies would have sold the property of the

petitioners unless restrained by the court, and it not being denied that such sale would occasion the petitioners irreparable damage, it must necessarily follow from said allegations and admissions that the petitioners were unable to pay the tax in question at the time of the institution of this action. It not being denied that the market for cotton mills and cotton-mill products was unusually low, there being practically no market at the time of the institution of this action, it must necessarily follow that a sale of the petitioners' property under such circumstances would cause a damage which would be irreparable and hard to estimate.

Under the allegations and admissions above set forth and in view of the authorities above cited, we maintain that this is a case in which the courts, as courts of equity, may enjoin the collection of the tax in spite of the inhibition of section 3224, Revised Statutes.

The case of Snyder *vs.* Marks, collector, 109 U. S., 189, is one of the cases relied upon by the appellants in this cause. In this case there was no allegation of irreparable damage or other equitable application such as to bring the case within any of the exceptions, and the court properly held that Snyder was inhibited by section 3224, Revised Statutes, from restraining the assessment and collection of a tax.

The case of Cheatham *vs.* U. S., 92 U. S., 561, is a case relied upon by appellants as an authority, but a careful reading of this case will disclose that it is a case where Cheatham appealed from an income tax and the Commissioner of Internal Revenue set it aside and ordered another, Cheatham paid the new assessment, and it was held by the court that he could not recover it back because he had not brought suit within six months from the decision of the Commissioner on

his appeal and had taken no appeal from the second assessment. There is nothing in this case relating to the right to restrain the assessment or collection of taxes, but the case deals solely with the question of a suit for a refund of the taxes, which of course is regulated solely by statute.

The State Railroad Tax case, 92 U. S., 575, is another case relied upon by appellants as an authority, but it is noted that in this case there was no allegation that the property of the railroad company would be sold, nor was there allegation of irreparable injury, nor other equitable allegations which would bring this case into an exception that injunction would not lie.

In Dodge *vs.* Osborne, 240 U. S., 118, the other case relied upon by the appellants as an authority that injunction did not lie, the court used this language:

> "It is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable."

The extraordinary and entirely exceptional circumstances mentioned by the court in Dodge *vs.* Osborne must be those circumstances enumerated by this court in the cases above cited, to wit, irreparable injury, cloud upon title, and multiplicity of suits.

The Child Labor Tax Being Admittedly Not for the Purpose of Raising Revenue But for the Purpose of Regulating Child Labor, and no Revenue Being Contemplated by the Act, the Reason for the Application of Section 3224, Revised Statutes, Fails.

The Government in its brief has the following to say:

> "However, I do not stress this point, for I prefer to add, in the spirit of candor, that there is plausible ground for the contention that the motive of Congress may have been to regulate child labor rather than to raise revenue."
>
> "If so, it is not the first time in the history of taxation that taxes have been imposed for other than fiscal purposes." * * *

The Government in its brief, speaking of the question of jurisdiction in this case, quotes the following from State Railroad Tax cases, 92 U. S., 575, 613:

> "This section has been said by this court to have grown out of the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence."

It being admitted by the Government, "in the spirit of candor," that the motive of Congress is to regulate child labor rather than to raise revenue, and that this tax is imposed for other than fiscal purposes, and it being shown by the Government that this act (section 3224, Revised Statutes) has grown out of the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government

depends for its continued existence, it must necessarily follow that section 3224, Revised Statutes, does not apply to this case, as the reason for the act fails, taking the Government's own position and own authorities as to the same.

THE JUDGMENT OF THE DISTRICT COURT IS RIGHT AND SHOULD BE AFFIRMED.

CAMPBELL B. FETNER,
W. CLEVELAND DAVIS,
Counsel for Appellees.

No. 599.

In the Supreme Court of the United States.

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MOTION TO ADVANCE.

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JOHN J. GEORGE, ETC., ET AL.
No. 590.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO ADVANCE.

The Solicitor General moves the court to advance the above-entitled cause for hearing on January 9, with the cases *J. W. Bailey et al.* v. *Drexel Furniture Company*, No. 657 (in which a motion to advance is now pending before the court); with the case of *Atherton Mills* v. *Johnston*, No. 16 (recently passed under the 26th Rule), and with the case of *Hill et al.* v. *Wallace, Secretary of Agriculture, et al.*, No. 616, now assigned for hearing on January 3, not as one case, but consecutively.

The case of *Bailey, Collector*, v. *George*, like the case of *Bailey, Collector*, v. *Drexel Furniture Company*, involves the question of the constitutionality of Title XII of the revenue act of 1918, being section

1200 et seq. of chapter 18 of the act of Congress approved February 24, 1919, known as the "Child labor tax act" (40 Stat. 1138), and bears a substantial similarity, except on the facts, to that involved in *Hill* v. *Wallace*. It is believed that the time of the court will be conserved by having the cases heard at the same time.

Counsel concerned agree to this motion.

JAMES M. BECK,
Solicitor General.

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